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No. 536

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1957

LEE OLIPHANT ET AL.,

Petitioners,

v.

BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN ET AL.,

Respondents

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY MEMORANDUM OF PETITIONERS

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Respondents' principal argument in opposition to certiorari (Opp., p. 9) appears to be that "Petitioners' Right to Become Members of the Brotherhood, If They Have Such Right, Must Be the Fifth Amendment" rather than the Railway Labor Act. But certainly certiorari is not rendered inappropriate simply because the question presented is constitutional rather than statutory. Petitioners had thought they were following the mandate of this Court in seeking to construe the Railway Labor Act so as to avoid the necessity for constitutional adjudication. But if, as respond-

ents claim, constructional avoidance of the constitutional question should prove impossible here, the grant of certiorari is not thereby rendered less appropriate.*

Respondents also renew the argument made below that petitioners would not benefit from membership because the Brotherhood's bargaining officials are unresponsive to the will of their members. They argue that "members of the Brotherhood do *not* determine Brotherhood policy or decide upon its collective bargaining objectives. The officers responsible for such matters arrive at their own decisions, uncontrolled by any form of direct dictation from the membership" (Opp., p. 7). It may, of course, be that undemocratic practices of the union will render petitioners' membership in the Brotherhood less valuable than hoped, but this hardly excuses denial of the right altogether. Racial exclusion cannot be justified by the circumstance that, once admitted, the Brotherhood will refuse petitioners effective control over the Brotherhood's bargaining decisions not because they are Negroes, but because the bargaining officials do not heed the expressed desires of the membership. Indeed, the Brotherhood's insistence that its bargaining officials determine bargaining objectives uncontrolled by any direct dictation from the membership defeats their argument; for if the respondents' claims of benevolent union paternalism by the bargaining officials are correct, exclusion of Negroes from the election of those bargaining officials is thereby rendered a prima facie de-

* In footnote 6 of the Brief in Opposition, respondents assert that petitioners are unjustified in stating that respondent is the "certified" representative of firemen, including petitioners. Of course, whether "certified" or merely "designated", as long as the Brotherhood acts as the exclusive statutory representative for firemen, it is prohibited from denying petitioners equal representation. But, as a matter of actual fact, the Brotherhood is a "certified" representative for petitioners and the District Judge specifically so found in the second sentence of his opinion (Pet., p. 13).

privation of all voice in the determination of their working conditions.

As a matter of fact, however, the Brotherhood's assertion of paternalism is contrary to its own judicial admissions below. Members of the Brotherhood, unlike excluded Negroes, may take part in the deliberations which form the basis of bargaining negotiations and demands for changes in working conditions. Petitioners' inequality in representation because of their exclusion from the Brotherhood's deliberations, in which Brotherhood members are given a voice, is clearly illustrated in the respondents' answers to six interrogatories propounded prior to trial, which have been included as Appendix A herein for the information of this Court.

Having shown racial exclusion from voice or vote in the election of their bargaining representatives and the formulation of their working conditions, petitioners have made their case for membership without more. But, in further illustration of the inequality flowing from their exclusion, petitioners went on to prove various forms of racial discrimination fostered by the Brotherhood in respect to specific working conditions. In an effort to avoid the impact of this further line of proof, respondents point to the District Judge's statement that "effective discrimination is by the railway employer, rather than by the Brotherhood." But respondents appear to concede (see Opp., pp. 4-5), as they must, that the discrimination of which the Judge was there speaking was the discrimination "which has resulted in years of litigation between the Negro firemen and the Brotherhood," to wit, discriminations based on the nonpromotability of Negro firemen which this Court struck down in *Steele*, *Tunstall* and *Graham*. The District Judge most definitely did not find that the voluminous evidence of other discriminations by respondents against peti-

tioners was attributable to the railroads; on the contrary he was clearly referring to the Brotherhood's conduct when he stated that "these plaintiffs and members of their class are discriminated against in respect to their representation and participation; their conditions of employment and other matters relating to their employment."

The grant of certiorari at this time is rendered peculiarly appropriate by the pendency of the *Conley* case, where this Court has under consideration the practices of a racially segregated union. Petitioners' case provides the factual and legal materials necessary for this Court's advised determination whether Negro employees can be found to be receiving fair and equal representation in accordance with the Railway Labor Act and the Constitution, when they are kept excluded, voteless and voiceless by their statutory bargaining representative. Respondents appear to assume (Opp., p. 14) that since the *Conley* case has been argued, it is no longer under active consideration by this Court. But this Court frequently considers two cases together even though argued at different times. Joint consideration is appropriate here in the light of the compelling reasons presented for contemporaneous determination of petitioners' case and that of *Conley* v. *Gibson*.

It is respectfully submitted that the Petition for Certiorari should be granted.

Respectfully submitted,

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APPENDIX A

Defendants' Answers to Plaintiffs' Interrogatories 1 Through 6 (Tr. 92-95)

Interrogatory 1. "Do the monthly or quarterly reports made by the General Chairmen of the Brotherhood of Locomotive Firemen and Enginemen, et al., (hereinafter referred to as the Brotherhood) referred to in Paragraph 14 of the Third Defense of Defendants' Answer, contain information about movements to bring about changes in the governing agreement between the Brotherhood and the carrier, or about negotiations with the carrier in connection with changes in the agreement, or about the formal notices with respect to such changes required by Section 6 of the Railway Labor Act?"

Answer 1: "While the Constitution of the Brotherhood requires General Chairmen to make monthly or quarterly reports to lodges and Local Chairmen under their jurisdiction, of work performed by them, the Constitution does not prescribe the form of such reports. Most General Chairmen include in their reports information about demands served upon railroads for agreements on new matters and changes in the existing collective agreement, served under Section 6 of the Railway Labor Act, and also information regarding the progressing of such demands in collective bargaining."

Interrogatory 2: "Are the monthly or quarterly reports described in Interogatory 1 readily available to firemen, hostlers, and hostler helpers (hereinafter referred to as firemen) not members of the Brotherhood?"

Answer to 2: "No."

Interrogatory No. 3: "What other means are used to inform members of the Brotherhood of matters of interest to them relating to their wages, hours or other working conditions?"

Answer to 3: "The President of the Brotherhood is required by the Constitution of the Brotherhood to issue monthly bulletins or circulars to other Grand Lodge officers, recording secretaries of lodges, legislative representa-

tives, General and Local Chairmen, and Secretaries of General Grievance Committees, of the work of collective bargaining conducted by the Brotherhood on a national or regional scale, and of other matters of interest to the membership as a whole. The Brotherhood also publishes and distributes to its members a monthly magazine."

Interrogatory 4: "Are the sources of information described in answer to Interrogatory 3 readily available to firemen not members of the Brotherhood?"

Answer to 4: "No."

Interrogatory 5: "Which of the following matters of interest to firemen are reported upon or otherwise discussed at meetings of the Local Lodges of the Brotherhood: negotiations with the carrier regarding changes in the governing agreement, dec ons in time claims and grievances cases which may be of general applicability, assignments of runs and possible or impending changes in assignment of runs, the set-up of pools, and the choice of relief points?"

Answer to 5: "Matters of general interest to locomotive firemen are discussed at meetings of Local Lodges, including reports of negotiations with carriers regarding changes in the governing agreement, decisions on time claims and grievance cases, assignments of runs and possible or impending changes in assignment of runs, the set-up of pools, etc."

Interrogatory 6: "Can firemen who are not members of the Brotherhood attend meetings of the Local Lodges?"

Answer to 6: "No."